

January 17, 2002

The Honorable Carl Johnson, Chairman  
Senate Environment Committee  
Room 104, Legislative Office Building  
Concord, New Hampshire 03301

The Honorable H. Charles Royce, Chairman  
Resources, Recreation & Development  
Committee  
Room 305, Legislative Office Building  
Concord, New Hampshire 03301

Subject: Instream Flow Rules

Dear Senator Johnson and Representative Royce:

As your committees prepare to consider bills relating to the issue of instream flow rules, I wanted to give you my personal assessment of how the rules development process has been progressing. I also wanted to suggest to you a course of action that may represent an effective compromise on this challenging issue, without having to amend existing instream flow authority. I appreciate very much your continuing to devote time to work toward its resolution.

As you well know, the mandate for the Department of Environmental Services (DES) to adopt rules establishing protected instream flow levels in the State's designated rivers has been in place for over a decade, during which time this department has devoted countless hours to understanding the science of instream flow, developing draft concepts, and seeking input from those interested in the issue. I don't hesitate to suggest that the amount of outreach we have sought and the amount of input we have received on this issue is unprecedented for this agency. That it has taken more than ten years to reach the point of a viable approach towards instream flow is indicative of the complexity of the issue.

There appears to me to be a growing consensus that the processes established by our proposed instream flow rules should proceed on a trial basis, applying only to two rivers. That so many divergent interests have acceded to this is a tribute to the hard work that everyone has done in developing these rules, both inside and outside DES. Some believe, however, that the Legislature should take action this session to pull back the authority reposed in DES since 1990 to establish and enforce instream flow rules. I disagree with this approach. At this juncture, the rules should move ahead, strictly limited to two rivers, the Lamprey and the Souhegan. The rules we are finalizing will do just that. Limiting the rules to two rivers will allow us to focus our time and resources (to the extent funding is available) to work through the processes established by the rules to simply see how they work. Without the authority to give rules a full "test", we are likely not to gain the insights we need to decide what future direction to take on this issue.

I am pleased that the development of proposed instream flow rules has reached a point where the business community, public water suppliers, and environmental interests are, in the

main, comfortable with DES moving forward on a trial basis to learn how the process that has emerged would work. We have crafted a process for instream flow protection that is tailored to the specifics of each designated river and incorporates comments received from the public and the regulated community. Our proposed draft rules would allow all interested parties to participate in the process, and would result in reasonable protection of instream flow while preserving the interests of water users and riparian owners.

In summary, the proposed rules include:

- An administrative process for evaluating water use compared to river flows
- A “de minimis” amount always available for off-stream use
- A fully public, river-specific process for **establishing protected flows** including:
  - A technical advisory committee
  - A water management advisory committee
  - A public hearing
  - A process for appeal, reconsideration, or change
- A fully public, watershed-specific **water management planning process** including:
  - All water users and dam owners
  - A water management advisory committee
  - A public hearing
  - A process for appeal, reconsideration, or change
- A process for administration of water management plans

We have selected the Lamprey and the Souhegan as the first two “pilot rivers”, based primarily on the number and mix of water users and dam owners on the designated river. We also looked at potential funding sources for any of the rivers. Though the Piscataquog is a close third in the ranking, we believe the added costs for determining protected flows and developing water management plans for the Souhegan are fully warranted.

The proposed instream flow rules have been criticized for not establishing protected flows but, rather, only establishing a process by which protected flows can be developed. This is a factually correct observation, but, in my estimation, the process we envision is precisely the one that we should follow to further develop protected instream flows. It provides for a fully public process focusing on hydrologic data and input from watershed interests on the most significant attributes of a particular designated river. It then provides an entirely distinct public process to allow water users to jointly develop a water management plan.

To allow this process to work properly, it is essential that the rules be allowed to go forward as they are proposed. The Legislature need not pass legislation that limits our rulemaking to two rivers, because we are already doing so. Further, if as has been discussed by the SB 330 Study Committee, the Legislature were to remove the authority for DES to require

water management plans to be developed and implemented, this would undercut substantially our ability to work through the process most effectively and learn the most from of it. The process of determining protected instream flows and developing water management plans should be scientifically-based, and should allow thorough interaction among all interested parties. I believe that the rules as currently proposed by DES will do just that, and the Legislature need not reach back in time and limit the authority that has been already given to DES to develop and implement instream flow rules.

The Legislature in 1990 wisely set a course for the State to begin looking at a more systematic approach to protecting the biological integrity of our river ecosystems. The requirement for DES to develop rules on protected instream flows for rivers designated under the Rivers Management and Protection Act is firmly rooted in RSA 483:1, 9-c, and 11. In passing these statutes, the Legislature recognized that river flow modifications by human activity may be extensive enough to affect vital river attributes, and that the State should begin to take action to understand that impact and mitigate it. The protracted and serious drought that we are currently experiencing in New Hampshire and the Northeast lends further current evidence to the need for the State to be considering how it will balance the competing needs of those who are relying upon water withdrawals from our rivers for their business operations and the watershed attributes that a community and the State find vital for protecting riverine habitat and important river uses.

Nationwide there is a growing acknowledgment of the legal and regulatory responsibility to recognize water quantity as integral to water quality and river health. This approach recognizes that a certain amount of flow is necessary to support fishing, swimming, and other designated river uses protected by state and federal water quality laws. Fish habitat studies confirm that most fish species have minimum flow requirements in order to successfully survive and reproduce. This is especially true of some of the fish species that we in New Hampshire consider most desirable such as trout or salmon. Although other uses such as swimming and boating may also be flow-dependent, we usually focus on fish habitat as the limiting factor. Human water use can alter river flows significantly, and the task of public policy makers and regulators is to define the instream uses to be protected, and the balance between off-stream water use and maintenance of instream flows.

For over twenty years, the U.S. Fish & Wildlife Service "Interim Regional Policy for New England Streamflow Recommendations" has formed the general basis for establishing protected instream flows in New Hampshire. Application of this policy, based on generalized considerations of New England streamflow patterns versus fish habitat, calls for water use to cease whenever summer flows are less than the August median flow (.5 cubic feet per second per square mile) or winter flows are less than the February mean flow (1.0 cubic feet per second per square mile). These aggressive standards have been applied to snowmaking withdrawals in Vermont, and at Loon Mountain in New Hampshire, as well as to relicensing of New Hampshire hydropower projects.

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We welcome legislative oversight of this very important issue; in fact, DES initially recommended the legislation that established the SB 330 Study Committee, for just this reason. I urge you and your colleagues to consider again the benefit of allowing DES to proceed with its two-river instream flow rules. At the present time there is no state funding available for this, but we are actively seeking funds from outside sources, most notably federal funding for the Lamprey River. Any budget modifications and any new rule proposals are fully subject to legislative oversight through the Joint Fiscal Committee and the Joint Legislative Committee on Administrative Rules, and the Legislature can intercede at any time in the future if it finds that the direction we are heading in is wrong.

Thank you again for your interest in and attention to this issue. Please do let me know if time would permit further discussion with you and your colleagues.

Very truly yours,

George Dana Bisbee  
Assistant Commissioner

GDB/hyv

cc: The Honorable Gary Francoeur  
The Honorable Lou D'Allesandro  
The Honorable Richard Cooney  
The Honorable Leon Calawa, Jr.  
The Honorable MaryAnn Blanchard